

## PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE  
SAN FRANCISCO, CA 94102-3298



June 29, 2004

Agenda ID #3714

TO: PARTIES OF RECORD IN RULEMAKING 93-10-002

This is the draft decision of Administrative Law Judge (ALJ) Philip S. Weismehl. It will not appear on the Commission's agenda for at least 30 days after the date it is mailed. The Commission may act then, or it may postpone action until later.

When the Commission acts on the draft decision, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

Parties to the proceeding may file comments on the draft decision as provided in Article 19 of the Commission's "Rules of Practice and Procedure." These rules are accessible on the Commission's website at <http://www.cpuc.ca.gov>. Pursuant to Rule 77.3 opening comments shall not exceed 15 pages. Finally, comments must be served separately on the ALJ and the assigned Commissioner, and for that purpose I suggest hand delivery, overnight mail, or other expeditious method of service.

/s/ ANGELA K. MINKIN by LTC

Angela K. Minkin, Chief  
Administrative Law Judge

ANG:tcg

Attachment

Decision **DRAFT DECISION OF ALJ WEISMEHL** (Mailed June 29, 2004)

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Rulemaking on the Commission's own motion to provide for mitigation of local rail safety hazards within California.

Rulemaking 93-10-002  
(Filed October 6, 1993)

**O P I N I O N**

This matter was initiated a number of years ago. No activity has directly occurred in this docket for several years although the subject matter of this proceeding has been actively litigated in the federal courts.

On May 17, 2004, a ruling was sent to the parties requesting responses to questions regarding whether there was a need for the proceeding to remain open and, if so, what the basis for that need was and what else remained to be done.

The Union Pacific Railroad Company and the Burlington Northern and Santa Fe Railway Company (Railroads) filed joint comments. The Rail Safety Branch of the Commission's Consumer Protection and Safety Division (Staff) filed comments as well. No other party filed comments. Both comments describe the litigation that followed our issuance of a decision in this proceeding, including *Union Pacific Railroad Co. v. CPUC*, 109 F. Supp. 2d 1186 (N.D. Cal. 2000) and *Union Pacific Railroad Co. v. CPUC*, 346 F. 3d 851 (9<sup>th</sup> Cir. 2003).

While Railroads state that this docket should now be closed, Staff requests that it remain open for one final activity. Staff represents that following a January 12, 2004 denial of certiorari by the United States Supreme Court, Staff and Railroads entered into settlement negotiations. On May 4, 2004, the parties

to the proceeding filed a settlement permitting the Commission to enforce the railroads own “train make-up” rules at designated local safety hazard sites in California. That settlement was approved by the United States District Court. Staff states that under the terms of the settlement the railroads are obligated to notify the Commission when any of their train make-up rules are changed and provide a specified level of justification for the changes. Fines are authorized for failure to provide such notification or to comply with their train make-up rules.

While Staff acknowledges that the settlement resolves all issues involved in the federal court litigation, they state there will be a need for the original decision in this rulemaking, Decision (D.) 97-09-045, to be modified to reflect the present state of the case. Staff states that it intends to file a motion requesting that D.97-09-045 be modified to conform it to the settlement agreement from the District Court proceeding. This will include a revised Appendix E in D.97-09-045, setting forth the updated railroad train make-up rules for the local safety hazard sites. Staff states that doing so will assist in monitoring and enforcing compliance.

Under the Commission’s Rules of Practice and Procedure, requests to modify Commission decisions are normally required to be filed within one year of the issuance of the decision. (Rule 47(d).) If more than one year has elapsed, as is obviously the situation here, the petition making the request must explain why the modification request could not have been made within one year. Staff should have no difficulty making such a demonstration, since the settlement that will be the basis for requesting a change in D.97-09-045 did not exist until very recently. We will, in fact, explicitly authorize the Staff to file such a modification request, and encourage it to do so promptly, certainly within one year from the date the settlement was approved by the Federal District Court.

However, the fact that a modification request may be filed at some point in the future does not require that this docket remain open until that occurs. In the event this docket is closed, the petition for modification, when filed, will cause it to be reopened for consideration of that petition.

Therefore, we will close this docket and direct the Commission's Docket Office to reopen it only for consideration of Staff's identified modification request. Upon resolution of that request, or the passage of one year without that request being filed, this matter will remain closed. Any subsequent actions related to the subject matter of this proceeding will need to be by way of initiation of a new proceeding, whether by a rulemaking or some other vehicle.

**Comments on Draft Decision**

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Section 311(g)(1) of the Public Utilities Code and Rule 77.7 of the Rules of Practice and Procedure. Comments were filed on \_\_\_\_\_, and reply comments were filed on \_\_\_\_\_.

**Assignment of Proceeding**

Susan P. Kennedy is the Assigned Commissioner and Philip Scott Weismehl is the assigned Administrative Law Judge in this proceeding.

**Findings of Fact**

1. While all matters related to this proceeding have been resolved, a request to modify D.97-09-045 may be filed by the Commission staff.
2. The settlement that is the basis for the anticipated request by Staff to modify D.97-09-045 was entered into and approved by the United States District Court in May 2004.

**Conclusions of Law**

1. The anticipated filing by Staff of a petition to modify D.97-09-045 does not require this docket to remain open pending that filing.

2. As described by the Commission staff, the anticipated petition to modify D.97-09-045 could not have been filed within one year of the issuance of that decision.

3. Staff should be permitted to file within this docket for the Commission's consideration a petition to modify D.97-09-045 to conform it to the settlement discussed above, if such petition is filed within one year of the date of the United States District Court's approval of the settlement.

**O R D E R**

**IT IS ORDERED** that:

1. If filed within one year of the date of approval of the May 2004 settlement by the United States District Court, the Rail Safety Branch of the Consumer Protection and Safety Division shall be permitted to file for Commission consideration a petition to modify Decision 97-09-045 for the purpose of conforming that decision to the settlement.

2. This docket will be reopened for consideration of such petition and for no other purpose.

3. Rulemaking 93-10-002 is closed.

This order is effective today

Dated \_\_\_\_\_, at San Francisco, California.